

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BARLIN M. ADAN

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

Docket No. **1,037,439**

ORDER

Barlin M. Adan requests review of the May 7, 2008 preliminary hearing Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

Barlin M. Adan had suffered a work-related back injury and was provided conservative medical treatment for that condition. She continued working at a light-duty job within her temporary restrictions. After epidural injections provided only temporary relief and her condition worsened she was considering surgery as recommended by Dr. William O. Reed. A diagnostic diskogram was scheduled to determine the appropriate level for back surgery. But on December 10, 2007, Dr. Reed was informed Adan was pregnant and he told her to cease all medications and to return to see him after the pregnancy was completed.

On December 18, 2007, Adan was in an automobile accident and was taken off work due to shoulder injuries suffered in that accident. In a progress note dated February 20, 2008, her doctor noted she attributed her ongoing discomfort to her preexisting back condition. The doctor continued her off work status at that time.

At a preliminary hearing held on May 5, 2008, Adan argued she was entitled to temporary total disability compensation from February 20, 2008 forward as her inability to work was due to her preexisting work-related back condition. The Administrative Law Judge (ALJ) found Adan's inability to work was related to a personal condition and not the work-related injury. Consequently, the ALJ denied Adan's request for continuing temporary total disability compensation from February 20, 2008.

Adan requests review of whether the ALJ exceeded her jurisdiction determining a personal condition was the reason for her inability to work beginning February 20, 2008.

Claimant further argues that denial of temporary total disability compensation where there is a pregnancy combined with the back condition violates the Pregnancy Discrimination Act.

Respondent argues that the Board does not have jurisdiction to review this matter and therefore the application for review should be denied. Respondent further argues that the Pregnancy Discrimination Act is inapplicable to the facts of this case where the claimant has failed to establish that her inability to work is due to the work-related injury. Finally, in its brief the respondent requests sanctions pursuant to K.S.A. 44-536a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, it must be determined whether there is jurisdiction for the Board to review this appeal from a preliminary decision. The respondent argues that the issue of whether a claimant is entitled to temporary total disability compensation does not raise a jurisdictional issue upon an appeal from a preliminary hearing. This Board Member finds that the dispute in this appeal is whether claimant's present status as temporarily and totally disabled is caused by her work-related accident. Stated another way, the issue is whether her present status arose out of and in the course of her employment. Thus, the Board does have jurisdiction to hear this matter.

Barlin Adan injured her low back in September 2006. She was having pain in her low back and both legs. She continued to work light duty with restrictions through December 2007. Respondent provided accommodated jobs that allowed Adan to alternate between sitting and standing.

Adan was diagnosed as having an L4-5 herniation with leg pain and received conservative treatment which included three epidural injections in her low back. During the course of her conservative treatment, Drs. Fluter, Glattes, Brown and Reed opined she was capable of performing her light-duty work within her restrictions. On November 19, 2007, Dr. Reed placed restrictions on Adan of no lifting greater than 35 pounds and no bending, stooping, twisting with alternating sitting and standing. These restrictions were being accommodated by the respondent. But Adan's back condition was worsening and she was scheduled for a diskogram in preparation for back surgery. However, when Dr. Reed was informed that Adan was pregnant he discontinued treatment for her back condition and told her to return to see him after the pregnancy was completed.

Adan was in an automobile accident on December 18, 2007. She injured her shoulder and was treated in the emergency room. On December 19, 2007, Adan was seen by Dr. Richard Hall. In his progress notes, Dr. Hall indicated Adan was requesting time off from work. Dr. Hall excused Adan from work for two weeks in order to convalesce and

scheduled a follow-up appointment in two-three weeks for a new OB visit and reassessment of the off work status. On February 14, 2008, Dr. Hall noted Adan complained of persistent pain from the automobile accident as well as chronic back pain from her work-related accident. The doctor continued Adan off work because work might worsen her condition. On February 20, 2008, Dr. Hall noted Adan complained of right-sided discomfort which she attributed to her preexisting back pain from her work-related accident. Her excuse from work was extended for three weeks. Adan returned to see Dr. Hall on February 28, 2008, with complaints of significant lower back pain which the doctor attributed to her L4-L5 disk herniation. Finally, in a letter dated May 2, 2008, Dr. Hall declined to offer an opinion whether Adan's injury prevents her from working and concluded that question should be directed to an orthopedic physician. The letter provided:

- 1) The analgesics being prescribed through this office for Ms. Barlin Adan's back pain was [sic] being administered as a result of her L4-L5 disc herniation, the discomfort of which has been exacerbated by the additional strain of pregnancy superimposed upon the original condition.
- 2) The question of whether or not Ms. Adan's injury prevents her from resuming work would be more appropriately directed to an orthopedic service, who has the training and expertise to make this judgement. Our involvement consists of prenatal care and attempting to provide symptomatic relief during the pregnancy. Assessing the extent of the musculoskeletal defect and rendering an opinion about her employment capabilities is an area outside of our expertise.¹

In summary, the evidence establishes that respondent was accommodating Adan's temporary restrictions and providing medical treatment. However, Dr. Reed discontinued his treatment upon learning that Adan was pregnant. Adan then was involved in an intervening automobile accident and was restricted from working while she recovered from shoulder injuries suffered in that accident. But by February 20, 2008, Adan's complaints referred to back pain from the work-related accident and claimant was provided an excuse from work as a result of those complaints. On February 28, 2008 she returned to her doctor with significant lower back pain which the doctor again attributed to her disk herniation from the work-related accident. It clearly appears that the doctor was restricting Adan from work because of her significant back complaints which were attributable to her work-related injury. However, in a letter responding to an inquiry he declined to opine whether Adan's back injury prevents her from returning to work.

Respondent argues that all the orthopedic doctors who had seen claimant had determined she could work within her temporary restrictions and respondent had accommodated those restrictions until the intervening automobile accident. However, all those doctors saw claimant before the intervening accident and, with the exception of Dr.

¹ P.H. Trans., Resp. Faxed Filed Attachment

Reed, before her pregnancy. And Dr. Reed refused to provide further treatment, as a result of Adan's pregnancy, before the intervening accident. Consequently, those opinions are not persuasive as they do not address Adan's current back condition.

As previously noted, Dr. Hall's progress notes certainly reflect that beginning February 20, 2008, Adan was being restricted from work because of increasing back pain attributable to her work-related injury. And her worsening back pain on February 28, 2008, was likewise attributed to her work-related injury. And although Dr. Hall, in his May 2, 2008 letter, refused to offer an opinion whether Adan's injury prevents a return to work, nonetheless, the letter also indicated that he was providing medication to alleviate her discomfort caused by the disk herniation which had been exacerbated by her pregnancy.

Although Dr. Hall is the only physician who has provided Adan medical treatment after the intervening accident and revelation of her pregnancy, he simply declined to offer an opinion in response to a letter inquiry as to whether her back injury prevents her from working.

The existence, nature, and extent of the disability of an injured worker is a question of fact and medical testimony is not essential to the establishment of such fact.² The claimant's testimony alone is sufficient evidence of her physical condition.³ Adan testified that she has pain in her back and both legs which is the same area that she has had pain since her work-related injury. That testimony is corroborated by Dr. Hall's February 20, 2008 and February 28, 2008 progress notes. Adan also stated that she has had to go to the emergency room for her back pain on three occasions. She agreed that her back pain has worsened since her pregnancy to the point that she now has difficulty sitting and sleeping. But Adan concluded that the medications her doctor now provides for her back pain do not sufficiently alleviate her pain enough to allow her to return to work.

Dr. Reed's medical notes indicate that Adan's back condition was worsening and preparations were being made for diagnostic studies necessary for back surgery. After Adan recovered from the intervening automobile accident her work-related back condition continued to worsen but was only being treated with analgesics due to her pregnancy. It is that back condition that Adan states prevents a return to work. This Board Member concludes Adan has met her burden of proof to establish that her current inability to work is the result of her work-related accident.

Finally, this Board Member declines to enter an order for sanction under K.S.A. 44-536a. The issue presented is well grounded in fact and law and the appeal does not appear to have been brought for any improper purpose.

² *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

³ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of this Board Member that the Order Denying Compensation of Administrative Law Judge Pamela J. Fuller dated May 7, 2008, is reversed and claimant is granted temporary total disability compensation commencing February 20, 2008.

IT IS SO ORDERED.

Dated this 31st day of July 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Beth R. Foerster, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2007 Supp. 44-555c(k).